88- 1734

Supreme Court, U.S.
FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

in the

Supreme Court of the United States

Spring Term, 1989

MARTIN DAYTON

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

FRED A. SCHWARTZ, ESQ.
ADORNO ZEDER ALLEN YOSS BLOOMBERG
SCHWARTZ & GOODKIND, P.A.
3225 AVIATION AVENUE
SUITE 400
MIAMI, FLORIDA 33133
(305) 858-5555

QUESTION PRESENTED FOR REVIEW

Whether the evidence at trial was sufficient to prove that the Petitioner committed mail fraud by causing an insurance adjustor in Miami, Florida to mail a medical report the Petitioner knew to be false to an insurance company located in Cincinnati, Ohio.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iv
Order Below	vii
Jurisdiction	vii
Relevant Statutes	vii
Statement of the Case	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	4
Reasons for Granting the Writ	6
A. The Law does Not Compel Judicial Abdication to the Findings of the Trier of Fact	6
B. A Reasonably-Minded Jury Must Have Harbored a Reasonable Doubt As to Whether Dr. Dayton Believed the Woman He Examined Had Suffered Recent Injuries	8

TABLE OF CONTENTS (Continued)

Page

1. Substantial Competent Evidence Regarding the Different Ages of Nancy and Micel, Including Evidence the Government Introduced, Created at Least a Reasonable Doubt Concerning the Identity of the Two Girls 9

2. Dr. Snyder's Testimony Directly Contradicting Dr. Mullin Created a Reasonable Doubt Regarding the Identity of the Two Girls and Dr. Dayton's Belief in the Freshness of the Burn 11

3. The Purely Circumstantial Evidence Against Dr. Dayton Was Rebutted by Substantial Direct Evidence in His Favor That Created a Reasonable Doubt as to His Guilt 13

Conclusion 16

Certificate of Service 17

TABLE OF AUTHORITIES

Cases	Page(s)
Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)	7
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942)	7, 8
United States v. Barrera, 547 F.2d 1250 (5th Cir. 1977)	7, 8
United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)	8
United States v. Gonzalez, 719 F.2d 1516 (11th Cir.), *cert. denied*, 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1983)	15
United States v. Haimowitz, 725 F.2d 1561 (11th Cir.) *cert. denied*, 469 U.S. 1072, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984)	6

TABLE OF AUTHORITIES (Continued)

Cases	Page(s)
United States v. Kent 608 F.2d 542 (5th Cir. 1979), *rehearing denied*, 611 F.2d 882, *cert. denied*, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980)	6
United States v. Parker, 839 F.2d 1473 (11th Cir. 1988)	6, 7
United States v. Sarro, 742 F.2d 1286 (11th Cir. 1984)	8
United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069, 107 S.Ct. 961, 93 L.Ed.2d 1009 (1987)	7
United States v. Simon, 839 F.2d 1461 (11th Cir. 1988)	8
United States v. Vera, 701 F.2d 1349 (11th Cir. 1983)	15

TABLE OF AUTHORITIES (Continued)

Page(s)

Statutes

18 U.S.C. Section 2 vii

18 U.S.C. Section 371 ..... viii, 7

18 U.S.C. Section 1341 ..... viii, 6

18 U.S.C. Section 1343 ix

18 U.S.C. Section 2314 ix

ORDER BELOW

The court below affirmed, per curiam, the judgment of conviction issued by the district court. The Order, issued without an opinion, is reprinted in the Appendix to this Petition.

JURISDICTION

This Petition arises from a criminal indictment filed against Dr. DAYTON in the District Court for the Southern District of Florida. The indictment charged him with violations of 18 U.S.C. Sections 1341, 2, and 371. Dr. DAYTON appealed the court's judgment of conviction to the United States Court of Appeals for the Eleventh Circuit, pursuant to jurisdiction vested in the court by 28 U.S.C. Section 1291.

On February 23, 1989, the Court of Appeals for the Eleventh Circuit issued its order affirming, per curiam, the judgment of conviction entered against Dr. DAYTON in the district court. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. Section 1254.

RELEVANT STATUTES

18 U.S.C. Section 2: Principals

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. Section 371: Conspiracy To Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. Section 1341: Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated to be or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for

mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. Section 1343: Fraud by Wire, Radio or Television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. Section 2314: Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

CASE NO.

In the Supreme Court of the United States

Spring Term, 1989

MARTIN DAYTON[1]

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

The Petitioner, MARTIN DAYTON ("Dr. DAYTON"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

[1]DR. DAYTON's co-defendant, Elias George Sayegh, was the only other party to the appeal below. He is not, however, a party to this Petition.

STATEMENT OF THE CASE

Petitioner submits the following Statement of the Case outlining the course of the proceedings in the courts below and the facts relevant to the Petition.

A. Course of Proceedings and Disposition Below

On September 11, 1985, the Government indicted Dr. DAYTON and two co-defendants, Elias George Sayegh and his wife, Susan Sayegh. Dr. DAYTON was charged in only three of the nine counts of the indictment. The indictment accused Dr. DAYTON of peripheral involvement in the Sayeghs' elaborate schemes to defraud insurance companies. It alleged that Dr. DAYTON submitted a medical report to an insurance company in 1984, falsely claiming that the Sayeghs' daughter had been scalded in 1982. Specifically, the indictment charged Dr. DAYTON with:

1) mail fraud under 18 U.S.C. Sections 1341 and 2, for mailing a fraudulent medical report to an insurance adjustor in Miami, Florida (Count V);

2) mail fraud under 18 U.S.C. Sections 1341 and 2, for causing the insurance adjustor in Miami, Florida to mail the fraudulent medical report to an insurance company in Cincinnati, Ohio (Count VI); and

3) conspiracy to commit mail fraud under 18 U.S.C. Section 1341, to commit wire fraud under 18 U.S.C. Section 1343, and to commit interstate transportation of stolen money or property taken by fraud under 18 U.S.C. Section 2314, in violation of 18 U.S.C. Section 371 (Count IX).

Dr. DAYTON was arraigned on November 14, 1985, and pled Not Guilty to all three counts.

The jury trial began on July 16, 1986. At the close of the Government's case, Dr. DAYTON moved for a judgment of acquittal. The court denied the motion as to Count I and reserved ruling as to the remaining counts.[2] At the close of testimony, Dr. DAYTON renewed his motion. The court denied it.

On July 24, 1986, the jury returned its verdict. It acquitted Dr. DAYTON of Count V, but convicted him under Counts VI and IX. On July 31, 1986, Dr. DAYTON filed a Renewed Motion for Judgment of Acquittal. Again the court denied it. On November 21, 1986, the court adjudicated Dr. DAYTON guilty under Counts VI and IX, and sentenced him to a fine of $1,000 under Count VI and $5,000 under Count IX. The court also ordered Dr. DAYTON to make restitution to the insurance company in the amount of $56,000 within seven years after sentencing.

On November 21, 1986, Dr. DAYTON filed his Notice of Appeal from the judgment and conviction order of the district court. On February 23, 1989, the Eleventh Circuit affirmed, per curiam, the lower court's judgment. This Petition followed.

---

[2]The court's ruling is cryptic because, as stated above, the indictment charged Dr. DAYTON only in counts V, VI, and IX, not in Count I.

B. Statement of Facts

The crucial issue in this case concerns identity. The Government contended at trial that one child, Nancy Manoukian, was scalded with coffee in 1978, and that Dr. DAYTON filed a medical report claiming she was actually burned in 1982. Dr. DAYTON claimed, however, and substantial unrebutted evidence established, that *two* girls existed: one, Nancy Manoukian, burned in 1978; and another, Micel Nukian—five years older than Nancy—burned in 1982. This issue is critical because if only one girl existed, then she had not been freshly burned in 1982 when Dr. DAYTON first examined her, and if Dr. DAYTON *knew* it, he was guilty of fraud. If, however, two girls existed, then the second burn was fresh and Dr. DAYTON, as a matter of law, could have committed no fraud.

At trial, Dr. DAYTON testified that he had been a board-certified practitioner of osteopathic medicine for thirteen years, with over five thousand patients. He had, however, limited experience in treating burns.

Dr. DAYTON also testified that he first met the Sayeghs at their hotel in July 1981. He treated Elias Sayegh for a back problem and Susan Sayegh for a sore breast after childbirth. Dr. DAYTON had never, however, met Susan's daughter, Nancy Manoukian.

Dr. DAYTON testified that on March 14, 1982, a Sunday, he responded to an emergency call from the Sayeghs and met them at his office. They brought with them a young woman named Micel Nukian, who was introduced to him as the Sayeghs' niece. The woman

had large blisters and redness over the left side of her face, neck, shoulder, breast, arm, and upper back. Dr. DAYTON noticed no evidence of previous burns, and no one informed him she had ever suffered any. He treated the woman, prescribed medicine, and directed that she return the next day for further treatment. Because no hospital staff was present at the time, Dr. DAYTON decided to wait until the following day to create Micel's medical file.

Micel never returned.

Two years later, on May 14, 1984, Micel visited Dr. DAYTON, at which time he examined her and established her patient file. He noticed substantial scarring in the area of the burn, and referred her to Dr. Walter Mullin, a physician specializing in plastic surgery.[3]

Sometime later, at Susan Sayegh's request, Dr. DAYTON prepared a medical report concerning Micel's injuries. The report stated that Micel had been burned with coffee on March 13, 1982, and had been treated the following day at the Medical Center in Sunny Isles, Florida. It also stated she was examined again on May 14, 1984, and found to have multiple areas of scar tissue, impairment, and disfigurement. Anthony Defendini, the Miami adjustor for Cincinnati Insurance Company, the

[3]As more fully explained below, Dr. Mullin testified at trial on behalf of the Government.

Sayeghs' insurer under their homeowner's policy, forwarded the report to Cincinnati Insurance.[4]

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition because, as demonstrated below, the Eleventh Circuit Court of Appeals has sanctioned so far a departure from the accepted and usual course of judicial proceedings by the District Court for the Southern District of Florida as to call for an exercise of this Court's power of supervision. The Petitioner submits the following argument in support of his Petition.

A. The Law does Not Compel Judicial Abdication to the Findings of the Trier of Fact

To convict Dr. DAYTON of mail fraud under 18 U.S.C. Section 1341, the Government must have proved beyond a reasonable doubt: (1) that he participated in a scheme to defraud; and (2) that he used or caused use of the mails in furtherance of the scheme. *United States v. Parker*, 839 F.2d 1473 (11th Cir. 1988); *United States v. Haimowitz*, 725 F.2d 1561 (11th Cir.), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984). An essential element of mail fraud is the specific intent to commit fraud. *United States v. Kent*, 608 F.2d 542 (5th Cir. 1979), *rehearing denied*, 611 F.2d 882, *cert. denied*,

---

[4]No conclusive evidence indicates how Defendini obtained the report. Dr. DAYTON did not recall whether his office mailed it to Defendini, or whether one of the Sayeghs physically transported the report to Defendini's office. Dr. DAYTON was, however, acquitted of Count V of the indictment, which charged him with mailing a fraudulent medical report to Defendini.

446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980). Therefore, the Government must have proved not only that Dr. DAYTON's medical report was false, but that he knew it was false and that he knew it would eventually be mailed to an insurance company.[5]

To convict Dr. DAYTON of conspiracy under 18 U.S.C. Section 371, the Government must have proved beyond a reasonable doubt: (1) an agreement to commit an unlawful act; and (2) an overt act by one of the conspirators in furtherance of the conspiracy. *Parker*, 839 F.2d at 1477; *United States v. Sawyer*, 799 F.2d 1494 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069, 107 S.Ct. 961, 93 L.Ed.2d 1009 (1987). As with any criminal case, the Government must prove every element of the offense beyond a reasonable doubt. *United States v. Barrera*, 547 F.2d 1250 (5th Cir. 1977).

For a conviction to stand, it must be supported by substantial evidence, viewed in the light most favorable to the government. *See Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), *citing Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed.2d 680 (1942).

> In reviewing the sufficiency of the evidence to support a criminal conviction, the standard of review is whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt."

---

[5]Because Dr. DAYTON was acquitted of Count V, which had charged him with mailing the false medical report to the insurance adjustor in Miami, the Government must have proved circumstantially that Dr. DAYTON *caused* the use of the mails; that is, that he knew his medical report would somehow be given to the adjustor, and that the adjustor would then mail it to Cincinnati.

United States v. Sarno, 742 F.2d 1286, 1293 (11th Cir. 1984), *quoting United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

Therefore, while *Glasser* requires an appellate court to examine the evidence in the light most favorable to the Government, "it does not compel judicial abdication to the findings of the trier of fact." *Barrera*, 547 F.2d at 1255. An appellate court must reverse the conviction if a reasonably minded jury *must* have a reasonable doubt as to the existence of the essential elements of the crime charged. *Id.* at 1255. If reasonable minds could not remove all reasonable doubt as to Dr. DAYTON's guilt, the Eleventh Circuit should have reversed the conviction. *United States v. Simon*, 839 F.2d 1461, 1465 (11th Cir. 1988).

As demonstrated below, the evidence at trial was insufficient to convict Dr. DAYTON of mail fraud and conspiracy beyond a reasonable doubt.[6]

B. A Reasonably-Minded Jury Must Have Harbored a Reasonable Doubt As To Whether Dr. DAYTON Believed the Woman He Examined Had Suffered Recent Injuries

Given the evidence introduced at trial, a reasonably-minded jury would have harbored a reasonable doubt concerning Dr. DAYTON's claim that he believed he examined a woman in 1982 with fresh coffee burns.

[6]Because this Petition challenges the sufficiency of the evidence to convict Dr. DAYTON, the argument below is necessarily fact-intensive.

Reasonable doubt remained because: (1) substantial competent evidence indicated that Nancy Manoukian and Micel Nukian were two different persons, establishing the existence of two burns; (2) the testimony of Dr. Mullin, the Government's chief witness against Dr. DAYTON, was directly contradicted by Dr. DAYTON's own expert witness; and (3) the evidence against Dr. DAYTON, which was purely circumstantial, was refuted by substantial direct evidence in his favor. The Petitioner addresses each of these points in separately-numbered sections below.

1. Substantial Competent Evidence Regarding the Different Ages of Nancy and Micel, Including Evidence the Government Introduced, Created at Least a Reasonable Doubt Concerning the Identity of the Two Girls

Uncontradicted documentary and testimonial evidence demonstrated that Nancy was eight years old when she was burned in 1978 (thirteen in May 1984), while Micel was nearly eighteen at the time of her consultations with Dr. DAYTON and Dr. Mullin in May 1984, or five years older than Nancy. This evidence, much of which the Government introduced, *at least* created a reasonable doubt regarding the existence of two different persons burned on two different dates. At most, the evidence conclusively demonstrates such facts.

Theresa Buono, a Government witness, testified that Nancy was eight years old when Buono first met her in 1978. St. Joseph's Hospital records also show Nancy's

age at eight years.[7] The surgeon's report regarding Nancy's burn, which the Government introduced, also gives her age as eight. Finally, an insurance accord form, also a Government exhibit, states Nancy's age as eight years.

The evidence regarding Micel's age is equally overwhelming, and establishes that she was nearly eighteen years old in May, 1984. Anthony Defendini, the insurance adjustor who testified on behalf of the Government, testified that when he met Micel in May, 1984 she was approximately seventeen or eighteen years old. He also testified that he was shown a passport at the time, in which her birthdate was given as June 20, 1966.[8]

Dr. Mullin, the Government's expert witness, also testified that Micel was eighteen when he examined her. His medical file shows her birthdate as June 20, 1966. Dr. DAYTON testified that Micel was seventeen in 1984, and his files reflect the same age.

Finally, Michael Sayegh, Elias Sayegh's brother, testified that Nancy and Micel were two different persons. He also testified that he witnessed the accident in 1982 in which Micel was scalded with coffee.

---

[7]These records were established on the day Susan Sayegh rushed Nancy to the hospital after Nancy was scalded with coffee. It would stretch credulity to presume that Susan Sayegh would be clever enough under such circumstances to falsify her daughter's age as part of a fraud she would not plan until months later.

[8]This date establishes her age at one month shy of eighteen years in May, 1984, when Dr. DAYTON, Dr. Mullin, and Mr. Defendini examined her.

These facts, at least, create a reasonable doubt regarding the identities of Nancy and Micel. At most, they conclusively demonstrate that they were different persons with two different scald burns.

2. Dr. Snyder's Testimony Directly Contradicting Dr. Mullin Created a Reasonable Doubt Regarding the Identity of the Two Girls and Dr. DAYTON's Belief in the Freshness of the Burn

Dr. Walter Mullin testified that he examined Micel in 1984. At trial he also inspected two photographs, one of Micel taken at the time he examined her, and another of Nancy taken in 1978. He determined that the burns reflected in the two photographs were similar in several respects. Based upon his analysis, Dr. Mullin concluded that Nancy and Micel "to me would be by my guess the same person."[9]

Dr. Mullin also testified that once a burn is over eight months old, it is considered mature and it is impossible to determine exactly when the burn occurred. He therefore could not determine whether or not Micel was burned in 1982. He stated, however, that even a

---

[9]Because the evidence showed that Nancy was burned in 1978, Dr. Mullin's testimony tended to show that Dr. DAYTON did not examine a fresh wound in 1982. As discussed below, however, Dr. Mullin's testimony was contradicted by Petitioner's own expert witness.

general practitioner should be able to distinguish between a fresh burn and a mature one.[10]

Dr. Mullin's testimony was the sole evidence against Dr. DAYTON. Moreover, on cross-examination Dr. Mullin admitted that Micel's scarring in 1984 was consistent with a 1982 burn, and that no contradiction existed between his own medical report and Dr. DAYTON's.

Furthermore, Dr. Gilbert Snyder, a plastic surgeon trained at Johns Hopkins School of Medicine who established the University of Miami's plastic surgery program, directly contradicted Dr. Mullin. Dr. Snyder examined the same photographs as Dr. Mullin, yet he could not conclude with reasonable certainty that they depicted the same injury. In particular, Dr. Snyder detected no evidence of a skin graft on Micel, while hospital records showed that a skin graft had been performed on Nancy in 1978. He also detected hypertrophic scarring—where the scar is raised over the skin—on Nancy, but not on Micel.

This testimony, as well as the substantial evidence concerning the different ages of Nancy and Micel, should have created a reasonable doubt in the jury's mind regarding the identity of the persons depicted in the photographs. In order to convict Dr. DAYTON of mail fraud for mailing a false medical report, it was necessary, though not sufficient, to prove beyond a

---

[10]This testimony tended to show that, if Nancy and Micel *were* the same person, Dr. DAYTON should have known when he first examined Micel that she had not been freshly burned. As shown below, this testimony was also contradicted.

reasonable doubt that only one person with a scald burn existed.[11]

Furthermore, Dr. Snyder testified that scars are more susceptible to sunburn, and that a sunburn over a mature burn may change the composition of that burn. Thus, Dr. Snyder's testimony is evidence that, even if only one person with a scar existed, the Sayeghs could have induced Nancy to develop a sunburn so that her mature burn would appear fresh to Dr. DAYTON, who was untrained in treating them.[12] This testimony, too, should have created a reasonable doubt regarding Dr. DAYTON's state of mind: whether he knew that Micel had not been scalded with coffee in 1982.

3. The Purely Circumstantial Evidence Against Dr. DAYTON Was Rebutted By Substantial Direct Evidence in His Favor That Created a Reasonable Doubt as to His Guilt

The only evidence on the record against Dr. DAYTON were: (a) Dr. Mullin's "guess" that the two photographs depicted the same person; and (b) his

---

[11]If only one person existed and Micel was not burned in 1982, the Government must also have proved that Dr. DAYTON *knew* that Micel was not burned in 1982 when he prepared the medical report, and that he knew the medical report would be mailed somewhere.

[12]The evidence established that the Sayeghs conspired to defraud, and in fact defrauded, several different insurance companies through various methods between 1978 and 1984. Their deception of Dr. DAYTON by inducing Nancy to sunburn herself would be consistent with their past practices, which included fabricating their own auto accident.

opinion that any physician should be able to differentiate between fresh and mature burns. His opinions were directly contradicted by the testimony of Dr. Gilbert Snyder, as demonstrated above.

Furthermore, the Government introduced no direct evidence that Micel did not visit Dr. DAYTON in 1982, no direct evidence that Micel was not burned in 1982, no direct evidence that Nancy and Micel were the same person, and no direct evidence that, even if Micel was *not* burned in 1982, Dr. DAYTON knew it. Moreover, the Government introduced no evidence that Dr. DAYTON knew his medical report would be submitted to an insurance company. The Government even failed to establish a motive for Dr. DAYTON to commit fraud and jeopardize his thirteen years as an osteopath. It conceded that Dr. DAYTON derived no benefit, other than a $75 check for the consultation—which was returned because of insufficient funds—from his alleged participation in a conspiracy.

Conversely, Dr. DAYTON presented direct evidence in his favor on all these issues. Dr. DAYTON himself testified that Micel visited him in 1982 with what he believed was a fresh burn. Furthermore, Joan Farcus, Dr. DAYTON's corporate attorney, testified that she was present at his office during Micel's visit in 1984. Dr. DAYTON introduced Susan Sayegh to her as Micel's aunt, and he told Farcus that he had seen Micel two years earlier for a coffee burn. As explained in Section 1 above, Michael Sayegh also testified that Nancy and Micel were two different persons, and that he witnessed Micel's scalding in 1982.

Dr. DAYTON's testimony also established that he never knew the purpose of his medical report. He testified that he had prepared the report at Susan Sayegh's request. She gave him no reason for her request, and he did not ask for one. Furthermore, although he was not certain, Dr. DAYTON believed Susan Sayegh retrieved the report at his office, and that his office did not mail the report. None of Dr. DAYTON's testimony on this issue was rebutted.

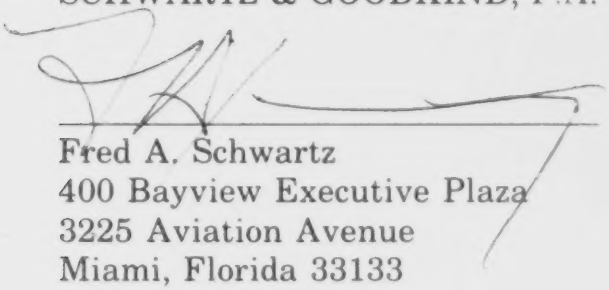
Therefore, substantial direct evidence rebuts the Government's circumstantial evidence that Dr. DAYTON somehow knew his medical report would ultimately be mailed to an insurance company. While the weight to be given direct and circumstantial evidence is the same, *United States v. Gonzalez*, 719 F.2d 1516 (11th Cir.), *cert. denied*, 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1983), given the plethora of conflicting evidence, a reasonable jury must necessarily have entertained a reasonable doubt regarding Dr. DAYTON's guilt. *See United States v. Vera*, 701 F.2d 1349 (11th Cir. 1983).

CONCLUSION

The evidence as a whole creates a reasonable doubt about Dr. DAYTON's guilt because: (1) the identity of the two girls remains, at best, inconclusive; (2) even if only one girl existed and she was not freshly burned in 1982, a reasonable doubt remains regarding Dr. DAYTON's knowledge of her condition; and (3) the evidence creates a reasonable doubt concerning Dr. DAYTON's knowledge that his medical report would be mailed to an insurance company.

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

ADORNO ZEDER ALLEN
YOSS BLOOMBERG
SCHWARTZ & GOODKIND, P.A.



Fred A. Schwartz
400 Bayview Executive Plaza
3225 Aviation Avenue
Miami, Florida 33133
(305) 858-5555

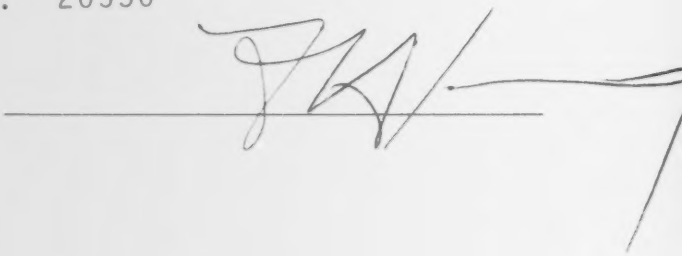
Attorneys for Petitioner
Dr. Martin Dayton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 20th day of April, 1989 upon:

Laura Wean Bonn
Assistant United States Attorney
155 South Miami Avenue
Miami, Florida 33130

Solictor General
Department of Justice
Washington, D.C. 20530



Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5968

D.C. Docket No. 85-695

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

MARTIN DAYTON, ELIAS GEORGE SAYEGH,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

(February 23, 1989)

Before TJOFLAT and JOHNSON, Circuit Judges and BROWN*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

---

*Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Judgment Entered: February 23, 1989

For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: MAR 21 1989

THE SOUTHERN DISTRICT OF FLORIDA

85-695-CR-HASTINGS-03

United States of America

vs.

MARTIN DAYTON,
250 190 Street, Sunny Isles, FL 33160

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date November 14, 1986

COUNSEL

WITH COUNSEL Fred Schwartz

PLEA

X NOT GUILTY

FINDING & JUDGMENT

There being a verdict of X GUILTY.

Defendant has been convicted as charged of the offense(s) of Count 6: Mail Fraud, 18:1341 & 2; Count 9: Conspiracy to commit mail fraud, 18:371.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant shall pay a fine in the amount of $1,000.00 as to count SIX. It is further Ordered that the defendant pay a fine in the amount of $5,000.00 as to count NINE. Additionally the defendant shall make restitution in the amount of $56,000.00 owed to the victim of this offense with such payment to be made no later than SEVEN (7) YEARS following the imposition of this sentence.

SIGNED BY

ALCEE L. HASTINGS Date 11/14/86

[Microfilmed date Dec 2 1986]